United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1192

CORRECTED COPY

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-1192

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD HUSS and JEFFREY SMILOW,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES

Cases: Page

Page

Statutes

Miscellaneous

IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	
	)	
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	)	
Appellants,	)	
	)	

BRIEF FOR APPELLANTS

Preliminary Statement

This is an appeal from an order of Hon. Thomas P. Griesa, entered on May 5, 1975, denying the appellants' motion for an order directing that, during the time they are in the custody of the Attorney General for service of a one-year prison term, they be provided the kind of food prescribed by their religious beliefs. The underlying judgments of conviction on which the appellants are serving their sentences were affirmed summarily by this Court on November 27, 1974. F.2d . Earlier related decisions of this Court are United States v. Huss,

Seigal & Smilow, 482 F. 2d 38 (1973); Smilow v. United States, 465 F. 2d 802 (1972), vacated and remanded, 409 U.S. 944 (1972), remanded 472 F. 2d 1193 (1973).

QUESTIONS PRESENTED

1. Whether federal prisoners who follow religious dietary laws are constitutionally entitled to be supplied with nutritionally adequate packaged meals which satisfy their religious convictions if it is demonstrated that such food as they might conscientiously eat from the regular prison diet would not provide sufficient nutritional content and such packaged foods are available at additional cost.
2. Whether a prisoner who would follow such rules for religious reasons if proper meals were available to him is constitutionally entitled to be provided with such meals in a federal prison even though he is prepared to eat regular prison food if special meals are not available.
3. Whether a district court before whom defendants are tried and sentenced has jurisdiction to issue an order to the United States directing it to provide such meals for such defendants.

Statute Involved

18 U.S.C. § 4082 provides, in pertinent part:

4082. Commitment to Attorney General - * * *

(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the Court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

Statement

After a trial by jury, Messrs. Huss and Smilow were found guilty of criminal contempt and each was sentenced to serve a term of one year. Their convictions were affirmed summarily by this Court, Nos. 74-2047; 74-2127, decided November 27, 1974. This Court's mandate was thereafter issued on February 21, 1975.

On March 7, 1975, before the defendants were scheduled to surrender pursuant to the mandate, an application was made on their behalf for "the provision of food that is in accordance with the orthodox Jewish requirements" to them during the

period of their incarceration (A.538-40). [1] The Court was advised that the problem of a religiously satisfactory diet was particularly acute at that point because the Jewish holiday of Passover was to begin on March 20. Judge Griesa indicated in the course of a brief hearing on March 6 that he did not know "how a prison is going to carry out this request," that he "can't help but observe that there is a tremendous effort to take care of the dietary problems of these two men and it is a little bit ironic in view of the crimes which they participated in," and that "there is no constitutional religious right to have special foods and they really have to select what they can eat out of the things that are available to them" (A. 544, 547, 556). When counsel responded that kosher "T.V. dinners" were available, Judge Griesa replied, "there are prisoners there that aren't getting T.V. Dinners and I am not sure if it would be very seemly for two young men to be singled out to get food of a different quality which I think it would be, than the other people there, and that's a problem" (A.559).

Noting, however, that he had received a call from a Congressman requesting that incarceration be delayed until after Passover, Judge Griesa deferred the surrender date -- over the

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1/ All references preceeded by "A" are to pages in the joint appendix filed herein.

opposition of the United States Attorney -- to April 4, 1975 (A.543-50). He then directed counsel, "if you feel strongly enough about this," to apply again to him on the basis of "something practical," instructing that such application be submitted "between now and April 4th" (A.560).

On March 27 an amplified application and a supporting Memorandum of Law were filed. The application and a motion for reduction of sentence were set for hearing on April 1, during a lunch recess in a jury trial before Judge Griesa. At the inception of the portion of the hearing relating to kosher food, Judge Griesa noted that the application contained no affidavits from Messrs. Smilow or Huss "stating on personal knowledge the bona fides of their actual observance of regulations relating to dietary laws" (A. 86). Counsel replied that the defendants were in court and available to testify, and that the papers had indicated that "Mr. Smilow is in terms of observance of kosher requirements more strict in his personal observance than Mr. Huss." (Ibid.).

Jeffrey Smilow then took the witness stand and testified that he had been educated and raised as a strictly observant Orthodox Jew, that he would not eat any non-kosher food wherever he goes, and that he observes the Sabbath and all Jewish holidays

and goes to the synagogue every Saturday (A. 88). He summarized his observance of the dietary laws by testifying that he would not eat any food that had been cooked in vessels used for non-kosher food (A.88-89).

Smilow also testified that he had been incarcerated at the Federal Detention Center in New York City on three earlier occasions relating to the same incident -- the first two times when he was held in civil contempt and immediately after his conviction for criminal contempt. On the first and third occasions no special arrangement was made for food, and he was able to eat only dry cereal and milk (and occasional fresh fruit or orange juice for breakfast, lettuce salad (when provided) at lunch and dinner, and he was sometimes given a hard-boiled egg (A. 94-99). He also ate baked goods at the prison because "I had nothing else," although "it wasn't clear" whether the baked product was permissibly prepared (A. 95). This food was supplemented by purchases he made from the prison commissary of fresh fruits, prepared bakery products (carrying rabbinical supervision) and potato chips (A. 91).

Smilow testified that on the occasions when no kosher food was brought into the prison, "I couldn't live on fruits and

the cakes alone, so what I had to do, I ate some of the potatoes and sometimes they gave vegetables, that is, cooked vegetables, cooked potatoes. I ate some of those." He admitted that eating these foods was a violation of his religious convictions, "but there was nothing else" (A.92). When cross-examined on the subject, Smilow testified that there had been several times when he ate cooked vegetables in violation of the dietary restrictions -- "why I did that, it reached a point where I was getting very hungry and I was losing a lot of weight. When I came out after two weeks, I had lost ten pounds, and I was very hungry. I had no choice" (A. 107).

The second time Smilow was at the Federal Detention Center, kosher frozen meals were brought in and made available to him. He testified that he knew of no particular problem in connection with bringing in the meals, and they were simply heated and served to him (A. 101).

Richard Huss testified that he had been raised in a kosher home and his parents were adherents of the Conservative Jewish faith. He said that he eats non-kosher foods "at times," although he would not eat pork products (A. 132). He testified on April 30, the fourth date of the hearing, that if kosher food were "available" he would eat it (A. 493-4):

Q. Is that preference based on some reason of conscience on your part?

A. Well, it's religious.

Q. It's religious?

A. Yes.

Q. Has to do with upbringing in a kosher home?

A. Yes.

Huss also testified that when he was at the Federal Detention Center with Smilow he followed Smilow's diet because he knew that Smilow "was serious in his dietary law, and I felt that it would be in his best interests as well as mine to support him" (A. 133).

At the hearing of April 1, the defendants also presented the testimony of Rabbi Joseph H. Ralbag, an Orthodox rabbi whose specialty is supervising, certifying and endorsing foods as kosher. Rabbi Ralbag explained the requirement of rabbinical supervision on the content of food (A. 112-7). He also testified at the hearing of April 1 and again when he was recalled, at the Court's request on April 28, that the only time an observant Jew may eat non-kosher food is "if it's a matter of life or death" (A. 122). He explained "that in Judiasm there is no give, and there is no dispensation as far as kosher food is concerned" and that only "if he will be dying, then I guess we can have

some give to save his life." (A. 124). Rabbi Ralbag testified that kosher frozen packaged meals are readily available on airlines, in hospitals and even in city prisons and that "most of the leading companies have prepared food" (A. 122-6).

A special brief session was held on April 16 to hear, out of order, the testimony of the Administrator of Food Services of the Bureau of Prisons. He testified that on special religious or national holidays special foods are "given to everybody" in a federal prison (A. 155). He also said that the average daily food cost per prison inmate in the federal system is $1.38 (A. 165), and that food could be acquired by a person only after competitive bidding (A. 168). He testified that fresh kosher food costs 25 to 100 percent more than non-kosher food (A. 174-5), and that kosher frozen meals -- available 25 miles from the institution where the defendants were to serve their sentences (A. 177) -- costs $2.50 to $3.00 per meal (A.177-180). The kosher frozen meal was described as a "T.V. dinner" including an entree and two vegetables (A. 177). The following colloquy then took place (A. 179):

> "THE COURT: Aside from the point of variety, I take it that a quantity of these could be bought and you have freezing facilities at Ashland, do you not?

"THE WITNESS: Yes, sir.

"THE COURT: And you could buy a quantity and keep them frozen.

"THE WITNESS: Yes, sir.

"THE COURT: And cook them as the need arose, right?

"Yes, sir." 2/

The witness then went on to state that the "problems" would be "the cost of procurement, administering, storage and separate handling" (A. 180), "the possibility of smuggling contraband into an institution through this supply" (A. 182), and "the biggest problem would be to give any one or two or a group of inmates specialized treatment" (A. 182). On cross-examination, the witness admitted that he was not an expert and had no specialized experience in the area of prison discipline (A. 197-200).

The witness also testified that a month-long diet of cold meals would not be an "adequate" or "acceptable" prison diet (A. 201-2). He also testified that a diet in which the

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2/ See also a similar exchange during the witness's cross-examination (A.190). Samples of the aluminum container in which the kosher T.V. dinners are contained were introduced in evidence as Defendants' Exhibits 1 and 2.

protein content over an entire month consisted of eggs and sardines would also not be acceptable "because of the palatability of it, the repetition of it, the texture of it, the color of it, perhaps" (A. 202). The same evaluation held true for a month-long diet of breakfasts consisting only of corn flakes, milk and toast (A.202-3). As for the reprovement of competitive bidding, he testified that a comparison of prices could be made by telephone (A. 205). He concluded by asserting that frozen packaged meals were unacceptable from the prison's point of view because they are "too limited in variety" (A. 208).

On the third day of the hearings, the defendants presented, inter alia, the testimony of (1) a nutritionist who teaches nutrition at Queens College and is employed by a large health foundation, (2) a caterer who had provided kosher food to a prisoner at the Federal Detention Center on West Street, and (3) the prison inmate who had received such food. The nutritionist testified that if no special supplements were given to someone in appellants' position and if, for reasons of conscience, they refused to eat any meat, fish or cooked foods on the prison diet, there "definitely" would be nutritional inadequacies in caloric requirements, protein requirements, iron requirements, and vitamin and mineral requirements (A. 280). She also

testified that supplementing the available diet with hard-boiled eggs and sardines would lead, because of the high intake of eggs, "to further occlusion of his vessels, his coronary vessels, or it definitely would result in elevated serum cholesterol levels as a primary issue" (A. 283). She also observed "that a diet consisting of sardines and hard-boiled eggs is very monotonous and very boring and not very appetizing, and could probably result in the person consuming less of those foods after a given period of time, often you just reach the saturation point where you just can't eat any more of them" (A. 287). The following exchange followed (A. 289):

> "Q. So that he would end up losing weight during the course of the year?
>
> "A. More than likely, yes.
>
> "Q. And eating less than he should eat?
>
> "A. Yes.
>
> "Q. As a matter of calories.
>
> "A. Yes, and also in terms of nutriment intake."

So far as the claim that other prisoners would be envious and view observant Jewish inmates as beneficiaries of special treatment, the nutritionist testified (A. 291-2):

> "There is a certain stereotype that's associated with eating TV dinners. Most people think it is not the best thing you can eat, and in terms of my knowledge about kosher TV dinners was four years when I was in college, our food service was not kosher and we had many Orthodox Jewish students who observed kosher dietary laws who were given TV dinners.
>
> "The feeling never was that they were getting better food than we were. The feeling always was that they were getting something that probably had less variety to it than what we were getting served."

The caterer's testimony and that of Stuart Cohen, a former inmate at the Federal Detention Center, established the ease with which the matter of providing kosher food in packaged frozen form could be administered (A.333-4, 325-330). Warden Gengler, of the Federal Detention Center in New York, testified as a government witness and his testimony permitted the same inference. The warden said that when Cohen was at the Detention Center he was asked by the Director of the Bureau of Prisons "to experiment" in providing kosher frozen food (A. 377). In response to the prosecutor's question whether "special security precautions" were required, Gengler said, "No more than ordinary when we would bring food into the institution" (A. 378). The meals were stored in a freezer and removed by Mr. Cohen at mealtime and heated in the oven (A.378-9). Gengler

testified that his kosher meals cost $4.00 each, and that the average cost of feeding an inmate at the Detention Center is $1.75 per day (A.379-80). Shortly thereafter, Gengler testified as follows in response to Judge Griesa's questioning (A. 382):

> "THE COURT: Look, you said you were asked by Mr. Carlson to experiment in the case of Sheldon Cohen. How did your experiment turn out?
>
> "THE WITNESS: The experiment I think with regard to Mr. Cohen I can say was successful."

Warden Gengler also testified, however, that after Cohen left, some of the kosher meals that remained were given to another inmate named Aaron Ron. Six "militant black Muslims" then approached the food administrator and demanded to know why they couldn't have their food and, "a short time thereafter Rabbi Ron was assaulted in our dining room and we had to put him in protective custody" (A. 381). The warden then said that providing kosher food was "impractical" because it would be a precedent that would obtain at every federal prison in the country, including those which include groups such as the Church of the New Song in Atlanta. He also said that "it accentuates the haves and the have nots" (A. 383).

On cross-examination, the warden testified that he knew of no other Jewish prisoner besides Ron who was assaulted because

he received special meals on holidays or other times (A.416). On the last day of the hearing, the defense also presented evidence that Ron was disliked by other prisoners -- including fellow Jews (A.498), and the warden admitted that it was possible that Ron had been causing difficulties among the inmates in ways other than his receipt of special food (A. 416). On the matter of added expense, the warden was not able to specify what regulation forbade receipt of private funds to make up the difference between the usual cost of food and the cost of frozen kosher meals (A.425), and defendants' counsel asked that the United States Attorney cite any regulation that imposed this limitation (A.427). No regulation has been cited to this day. Finally, the warden testified that there was "no problem" in providing the kosher frozen meals in prison, and agreed that the only problem was envy on the part of other inmates (A.433).

After a fourth day of hearing, during which Smilow testified with regard to his religious practices in prison and the food he had eaten while in custody between April 4 and April 30, the record was closed. On May 5, Judge Griesa issued a 34-page opinion denying the requested relief. The major points of the opinion were the following:

(1) Huss' claim was summarily rejected because, "by his own testimony, he is simply not an observer of the kosher dietary requirements."

(2) A discussion of Jewish law culminated with the "findings" that contempt of court was punishable, under Biblical law, with the death penalty while there was "no specific penalty provided for violation of the dietary laws." On this basis, Judge Griesa viewed the dietary rules "in some perspective" whereby "the need to enforce the essential criminal laws was of prime importance to the Hebrew lawgivers."

(3) The higher cost of frozen kosher packaged food was cited, as well as the incident involving Aaron Ron (although Judge Griesa recognized that Ron "may have had personality problems that aggravated the situation.") The court rejected the response that the higher cost would be miniscule because of the small number of Orthodox Jewish prisoners by asserting that others would make similar demands and that it would be "repugnant to prison discipline" to permit prisoners to pay "for their own special and more expensive food."

(4) The foods in the regular prison fare that an Orthodox Jew could eat were listed: fresh vegetables, fresh fruits, canned fruit, dry cereal, milk, bread and butter, coffee and ice cream, all supplemented with hard-boiled eggs and canned fish. Judge Griesa found that "an adequate diet" would be supplied if cooked vegetables were added to this diet. He then noted that Smilow had eaten cooked vegetables on past stays in prison, overlooking the reason stated by Smilow for having done so.

(5) Reviewing the cases dealing with Black Muslim demands for religiously permitted food in prison, Judge Griesa acknowledged that they contained "statement of rather broad theories." Nonetheless, he insisted, there was no case wherein prisoners were actually required to provide Black Muslims with special food.

(6) The standard applied in several of these cases -- i.e., that the state must demonstrate a "compelling governmental interest" in refusing to meet religious dietary demands of prisoners -- is not, in Judge Griesa's view, the standard of this Court or the Supreme Court. The proper standard, he said, was

that prison procedures may be challenged only if they are "clearly unreasonable."

(7) Accordingly, the Bureau of Prisons was right in refusing to provide distinctive and more expensive food for Orthodox Jewish prisoners. "[I]t would be contrary to good order and discipline to permit one group of prisoners, or organizations supporting them, to pay for their more expensive special food" (A. 536).

Two days after Judge Griesa issued his ruling, Judge Jack B. Weinstein of the Eastern District of New York decided precisely the same issue the opposite way. In United States v. Kahane, No. 71-CR-479, and Kahane v. United States, No. 75-C-624, he ruled that a criminal defendant in federal custody was entitled, under the First and Eighth Amendments, to be provided food that satisfied his religious needs.[3/]

On a record that contained less evidence regarding the adverse physical consequences of maintaining a kosher diet in prison without the use of frozen packaged meals, Judge Weinstein concluded:

3/ For the convenience of the Court, we are filing with the Clerk seven copies of Judge Weinstein's decision.

> "(1) dietary laws are of critical theological importance to Orthodox Judiasm; (2) incarceration does not relieve an orthodox Jew of the obligation to obey these religious requirements; (3) defendant observes these practices strictly and would have to be in danger of death through fasting before he could partake of a non-kosher diet; (4) the Bureau of Prisons has refused to, and will refuse to, provide the defendant with food consistent with his orthodox Jewish religious beliefs; and (5) providing foods meeting orthodox Jewish requirements does not create significant administrative difficulties in prisons.

Accordingly, Judge Weinstein directed that "at a minimum federal prisons must provide dietary alternatives to Jewish prisoners observing dietary laws that would not violate kosher requirements -- for example, certain fruits, acceptable breads, cheeses, tinned fish, boiled eggs and vegetables, supplemented by hot kosher pre-cooked frozen meals." He indicated that it would be "satisfactory" if the kosher foods were provided by local or national community groups, and he rejected the contention that additional cost would result by noting that "the government does not contest the fact that only in the order of a dozen persons would have to be provided with such food, so that costs would not be significant." In addition, Judge Weinstein observed, "The Bureau of Prisons has traditionally had to provide numerous specialized diets in the medical treatment facilities that are a part of every prison." He found that the

burden on the Bureau of Prisons was "only minimal administrative inconvenience" and that "[t]he government has shown no serious, much less compelling, reasons why provision of a kosher diet for this defendant would affect prison security or discipline."

Although Judge Weinstein's order, effective immediately, was entered on May 7, the government has not, by the date on which this brief is written, applied for any stay of that order or even filed a notice of appeal.

Judge Griesa was asked on May 8 to order, on an interlocutory basis, that kosher food be provided, pending appeal, to Smilow, who had followed a very restricted diet since April 4, when he surrendered. The application was denied.[4/] An application to a panel of this Court (Mulligan, Timbers, Gurfein C.JJ.), argued on May 20, 1975, was denied 2-to-1, Judge Gurfein dissenting. A request for relief was then submitted to Mr. Justice Marshall, who has referred the application to the full Supreme Court. No decision has been issued as of the time this brief is being written.

[4/] The government also moved on May 9 for modification of the opinion on the ground that it applied an erroneous standard. Judge Griesa thereafter issued an additional memorandum clarifying his views, but did not withdraw the standard previously announced.

ARGUMENT

Introduction

The proper scope of "prisoners' rights" is a subject of considerable current debate among judges, lawyers and legal scholars. As recently as April and June 1974, the Supreme Court ruled that state prisoners were constitutionally entitled to be relieved from over-broad mail censorship regulations (Procunier v. Martinez, 416 U.S. 396 (1974)), but could be prevented by regulation from having any interviews with reporters or other media representatives (Pell v. Procunier, 417 U.S. 817 (1974)). This case presents no refined issues of prisoners' rights of the kind involved in Martinez and Pell. It goes, rather, to the essence of civilized treatment of those whom the federal correctional system seeks to rehabilitate. It deals directly with two of the most fundamental human instincts -- the need for food and the need for religious fulfillment. The issue, starkly framed, is whether the Bureau of Prisons may, on account of administrative difficulties described as "minor practical problems" by Judge Weinstein and as "picayune" by Judge Gurfein, force a federal

prisoner to choose between substantial malnutrition and surrender of his conscientious scruples. A prisoner's right to correspond freely with the outside world -- viewed as important enough to warrant vindication by the Supreme Court -- surely shrinks to insignificance when contrasted with his impelling human drive to eat and with a moral imperative to obey divine commands.

We argue below that any bona fide religious practice of prison inmates is protected by the First Amendment against governmental inhibition by deliberate inaction as well as by active interference. But we emphasize at the outset a point that was totally overlooked by Judge Griesa and insufficiently emphasized even by Judge Weinstein -- that is that the effect of the Bureau of Prisons' rule is not merely to compel religious violations but to do so by the very cruel means of exploiting a human being's hunger pangs. Clearly if prison authorities, for economic or administrative reasons, deliberately starved their inmates or offered them only one meal a day, their conduct would be condemned by all civilized persons.

Indeed, if prison authorities refused to give to inmates who require medically prescribed diets special meals that are nutritionally adequate, they would be universally viewed as brutal and callous. But when the same authorities provide an equally inadequate diet to those whose consciences -- rather than doctor's orders -- keep them from eating other foods, a district judge says they are "entirely correct." This stands the Constitution on its head. The First Amendment guarantees the free exercise of religion; it nowhere mentions medical prescriptions.

I.

JEWISH PRISONERS HAVE FIRST AND EIGHTH AMENDMENT RIGHTS TO A NUTRITIONAL DIET MEETING THEIR RELIGIOUS REQUIREMENTS

A unanimous Supreme Court, speaking through Mr. Justice Powell, said in Procunier v. Martinez, 416 U.S. 396, 405-406 (1974), "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts

will discharge their duty to protect constitutional rights." And in Pell v. Procunier, 417 U.S. 817, 827 (1974), a Court majority noted that constitutional claims asserted by prisoners "must be analyzed in terms of the legitimate policies and goals of the corrections system" and that "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties."

This case involves a clear and undisputed constitutional liberty -- the right of religiously observant Jews to eat kosher food, i.e., food which has been prepared in a manner that satisfies the requirements of their faith. In Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y.), affirmed, 95 S.Ct. 22 (1974), a three-judge court recognized that the Jewish religious obligation to eat only kosher food is a religious practice fully protected by the Free Exercise Clause of the First Amendment. And in a series of cases involving the rights of Muslim prison inmates to pork-free meals, the courts have consistently assumed that the First Amendment extends to the observance of a religiously prescribed diet. See, e.g., Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1968); Ross v. Blackledge, 477 F.2d 616 (4th Cir. 1973).

The obligation imposed by Jewish law upon every member of the faith to eat only kosher food applies inflexibly in every situation except where life itself is at stake. In summarizing the testimony of a leading rabbi who appeared in the Kahane case, Judge Weinstein said "that an Orthodox Jew must be 'in extremes' before violating these laws."[5/] As Rabbi Ralbag testified in this case,

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5/ The testimony of Rabbi Moshe Tendler, quoted by Judge Weinstein, was as follows:

> "If all [an Orthodox Jew] had was non-kosher food to eat, he would have to wait until his physiological state -- his vital signs would be so determined by competent medical authorities that he is in danger of dying -- then and only then could he partake of food [according to Biblical and Rabbinic law].
>
> * * * *
>
> "Up until forfeiture of life, man must forfeit everything he has, company of his wife and children, his entire wealth, to enter into the realm of the most poverty-stricken rather than transgress the Kashruth laws.
>
> "He is to allow himself to be subjected to torture, to physical torture, to mutiliation rather than consume [non-kosher] food.

violation of the laws of Kashruth is permissible only if it is a matter of life or death (P A. 122). Indeed, when appellant Smilow was personally asked on the stand whether he knew of any dispensations from the kosher food requirements, he replied that the law may be broken only if one finds oneself on a boat in the middle

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5/ Cont'd from p. 25.

> "I hope that impresses the Court with the fact that we are not dealing with a frivolous notion. It is not a question of a special dietary requirement of white wine with fish or red wine with beef. We are talking about a critical need of the Jew to relate with his God in a series of instructions that have been our mark of distinction from the days that we left Egypt so many thousands of years ago.
>
> * * * *
>
> "At no time is he exempted, from the day he is born . . . until the day he dies . . . he is governed by Jewish law."

of the ocean or in the middle of the desert (A. 107).

Consequently, the issue is whether the government may force a conscientious observer to bring himself to the brink of death by withholding from him anything other than regular prison food. Plainly the answer is "No." In Sherbert v. Verner, 374 U.S. 398 (1963), the issue was whether a State rule that denied unemployment compensation benefits to a Sabbath-observer who had refused a Saturday job was constitutional. The Court determined that such a rule "forces [the religious believer] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404.

The "forced choice" in this case is far more severe than it was in Sherbert. A prisoner has no alternative source of food other than what his jailers offer; Ms. Sherbert might have had other sources of funds. The pressure

that grows out of cutting off a food supply is probably the most severe pressure that can be placed on a human being; Ms. Sherbert, by contrast, was being denied 22 weeks of compensation payment -- hardly as effective a lever or as impelling a reason to violate rules of a religious faith. Yet the Court in Sherbert viewed the State's conduct as applying "pressure upon her to forego that practice" [of Sabbath-observance], 374 U.S. at 404. The "pressure" on a prisoner such as Jeffrey Smilow to forego his religious practice is, if possible, many times more "unmistakable" than the "pressure" on Ms. Sherbert.

Religiously motivated conduct such as polygamy or child labor, which presents "some substantial threat to public safety, peace or order" (374 U.S. at 403), is, of course, in different posture. Harmful conduct may more readily be regulated, even if it is commanded by religious law. But what is involved here is conduct that presents no threat whatever to society; it merely results in administrative inconvenience or added expense to federal officials. In these circumstances, the proper

standard by which to measure whether the religious observance may be inhibited or otherwise restricted is by deciding "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right." 374 U.S. at 406. In Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), the Court said, in a similar vein, "the essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

Judge Griesa erred in the standard he applied in both his original and supplemental opinions. He stated initially that a prisoner may prevail in a challenge to a prison regulation that inhibits his religious liberty only if "the practice in question is clearly unreasonable." Such a standard treats religious liberties no differently from any other activity in which a prisoner wishes to engage, whether or not constitutionally protected. A prisoner's freedom to play football, for example, is not,

one supposes, constitutionally protected. If, however, a prison regulation that forbids the playing of football were shown to be "clearly unreasonable," the regulation would be an arbitrary imposition and violative of the Due Process Clause. To say, therefore, that a religious right is protected only if its inhibition is "clearly unreasonable" is to give no weight whatever to the preferred position that First Amendment liberties occupy.

Moreover, the "clearly unreasonable" test conflicts with virtually every Religion Clause case ever decided by the Supreme Court. When, for example, the Supreme Court upheld the Sunday Laws against a challenge by Sabbath-observers in Braumfeld v. Brown, 366 U.S. 599 (1961), it was not remotely suggested that the religious observer would lose his lawsuit if there were any rationality whatever to the laws. The Court went to great pains to demonstrate that exceptions to the laws would undermine their purpose and that their effect on Sabbath-observers was only indirect.

The conclusion in Judge Griesa's Supplemental Opinion that prisoners are different from those who assert

religious-liberty claims outside of prison is merely a statement of what is obvious. It does not mean -- as Judge Griesa apparently assumed -- that once prison officials "come forward . . . with an explanation," the case is over because of "the province and professional expertise of corrections officials." Indeed, in Pell v. Procunier, 417 U.S. 817 (1974) -- the case Judge Griesa found "more closely in point" -- the Court followed its admonition that there be deference to the "expert judgment" of prison officials [quoted at p. 5 of Judge Griesa's Supplemental Opinion] with the following language (emphasis added):

> "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation."

The central distinguishing element between Martinez and Pell was that in Pell the Court majority felt that the challenged restriction impinged only on "one manner of communication" while leaving other alternatives freely

available. 417 U.S. at 823. After discussing the available alternatives by which prison inmates could communicate with the outside world, the Court concluded that "reasonable and effective means of communication remain open," and "in light of the alternative channels of communication that are open to prison inmates, we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional." 417 U.S. at 827-828.

There was, under this analysis, very little inroad into the prisoners' First Amendment rights in Pell. In the present case, on the other hand, the infringement is total. The government introduced no proof to establish that the food which observant Jews may eat from the usual prison diet is nutritionally adequate; all the evidence in the record is to the contrary. Indeed, even the Bureau of Prisons' own food administrator testified that such a regular regimen would not be acceptable and, in fact, not adequate.

Under the test of Sherbert v. Verner, 374 U.S. 398 (1963), Jewish prisoners' religious rights are denied when they are pressured -- as Jeffrey Smilow has been -- to eat food that violates religious law. Ironically, the government has sought to use against Smilow, in his applications for interlocutory relief, the fact that severe hunger pangs compelled him, on occasion, to eat questionable cheeses or cooked vegetables which he would not, for reasons of conscience, eat if any permissible food were available. Not every religious believer is a saint, ready to go to the brink of death for convictions honestly held. Most of us succumb to the needs of the flesh. It should, in a civilized society, be a subject for sympathy, not scorn, that an individual as to whom Judge Griesa had "no question about the bona fides of his religious beliefs" (A. 499) was forced to violate his religious principles because his jailers would not undertake minimal accommodation to his religious needs. Ms. Sherbert's case surely did not turn on whether she managed to live without unemployment compensation for the full 22-week

period. If dire economic circumstances had forced her because of the absence of unemployment benefits, to take a job in which she violated her Sabbath, the Supreme Court would, one supposes, have been more not less, persuaded of the unjustness of the State's limitation.

This case, therefore, is not one in which only one alternative form of religious practice is restricted while other equally suitable means are made available. It is, rather, a case in which the Bureau of Prisons is telling its Jewish inmates that their obligation to follow religiously approved diets will have to be denied totally in prison because of administrative inconvenience and added expense. That route is just constitutionally impermissible.

The fact that the Bureau of Prisons takes no affirmative action to deny the religious liberty but that its policy has that effect by reason of its inaction is no defense to the defendant's challenge. In Sherbert v. Verner, of course, the same was true. It was the State's denial of a benefit -- not an affirmative prohibition -- which had the consequence of infringing upon religious liberty. Yet the Supreme Court viewed the

effect as identical to a "fine" for a particular form of worship. Here, too, the refusal to undertake the very small administrative job of purchasing and stocking certain frozen meals is a penalty for a particular form of belief.

The Bureau of Prisons' position is particularly incongruous in view of the realization in its Policy Statement of June 27, 1973 (Deft. Exh. No. 10) that there is an affirmative duty on the Bureau to distribute available resources so as "to extend to committed offenders the greatest amount of freedom of, and opportunity for, pursuing individual religious beliefs and practices." To this end, the Bureau incurs the expense of hiring full-time and contract chaplins, purchasing religious materials, arranging worship services, and providing religious instruction. In addition, testimony was given by government witnesses indicating that the Bureau offered special religious holiday meals on particular occasions.

Whatever may be the government's obligation when dealing with individuals who are free to go and do as they please, the constraints of the Free Exercise Clause are substantially different when -- as Judge

Weinstein noted -- "government has total control over people's lives, as in prisons." When government assumes such a controlling stance -- as for example, in the military -- it comes under a firm constitutional obligation to provide for religious needs that its subjects would be able to secure for themselves in the outside world. A prisoner loses some rights when the jail doors close behind him, but, as Mr. Justice Marshall noted in Procunier v. Martinez, 416 U.S. at 428, "he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded." To compel a prisoner to violate religious convictions while in jail is at least as antithetical to the concept of rehabilitation as a suppression of his right of free speech, which was sustained by the Court in Martinez.

It is for this reason that the consistent line of decisions in all Circuits has recognized that State prison authorities have a heavy burden of justifying

prison regulations that compel violation of religious dietary rules. The general rule was stated in Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967):

> "Courts will closely scrutinize the reasonableness of any restriction imposed on a prisoner's activity in the exercise of his religion."

See also Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968).

Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969), is the leading case in the area. Muslim prisoners had brought suit against officials of the District of Columbia jail on the ground that their First Amendment rights were abridged by the prison's refusal to serve at least one full-course pork-free meal each day. The district court sustained the prison official's position -- essentially the same as is noe embodied in the United States Bureau of Prisons' Policy Statement -- that it is sufficient accommodation to meet constitutional standards to permit prisoners to abstain from eating unacceptable foods and to provide for him added portions of non-rationed food items which satisfy his religious needs. See Para. 4(f)(1) of Bureau of Prisons Policy Statement

7300.43B (June 27, 1973) (Deft. Ex. No. 10). The Court of Appeals reversed that conclusion. It held that the prison diet at the D. C. Jail appeared to be "governmental activity [which] impairs individual ability to abide [by] religious beliefs." 410 F.2d at 1000. Accordingly, it held that "two demonstrations" were essential to support the validity of the prison policy: First, that it is supported by a "compelling state interest" justified by "the gravest abuses endangering paramount interests," and second, that "no alternative forms of regulation" could satisfy those compelling state interests.

The other Muslim food cases have followed similar courses, although courts have differed on the question whether a particular person's diet if only pork-free foods are selected, provides sufficient nutrition to require judicial relief beyond advising prisoners which foods contain pork. See Ross v. Blackledge, 477 F.2d 616 (4th Cir. 1973); Wilson v. Prasse, 463 F.2d 109 (3d Cir. 1972); Elam v. Henderson, 472 F.2d 582 (5th Cir.), cert. denied, 414 U.S. 868 (1973); Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Northera v.

Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), aff'd, 448 F.2d 1266 (9th Cir. 1971); SaMarion v. McGinnis, 35 App. Div. 2d 684, 314 N.Y.S. 2d 715 (4th Dept. 1970); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974).

Fair consideration of this problem is not furthered, however, by assertion of extreme fears on the part of the Bureau of Prisons. There are to be sure, opportunities for far-fetched demands by prison inmates under the guise of religious belief. In Theriault v. Carlson, 339 F. Supp. 375 (M.D. Ga. 1974), claims were asserted on behalf of adherents of a faith known as "the Church of The New Song" which first began in the federal penitentiary at Atlanta. Some assertion has been made that this "faith" requires one meal of steak and sherry each day. The proper way to deal with such a claim of religious conviction is to make a searching test of its bona fides -- which is exactly what the Fifth Circuit ordered when the case came to it on appeal. 495 F.2d 390.[6/] But it is hardly fair for government

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6/ In the absence of evidence going to bona fides, however, it is appropriate to accept the religious principles as stated. Compare Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir. 1974), cert. denied, 43 U.S.L. Week 3281 (1974).

officials to force violations of principle from adherents of a faith that has, for thousands of years, adhered to a well known, firmly established and universally respected dietary code because they fear that charlatans may follow in their footsteps. The law must have other means for dealing with those who would dissimulate than to penalize the innocent.

This brings us, finally, to the question whether the explanation offered in the district court by the Bureau of Prisons satisfies the "compelling state interest" and "no alternative form of regulation" tests. We note, initially, that even though the government strenuously sought to have Judge Griesa make such an ultimate finding, the Judge refused to do so. In his Supplemental Opinion, Judge Griesa would only go so far as to say that the refusal to provide kosher food was "amply justified for reasons of sound administration, order, discipline and security" and that the Bureau of Prison's response could not be said to be "exaggerated."

The reason for the judge's refusal is not hard to imagine. There is simply nothing of substance in the record to support the Bureau's adamant refusal. Various "explanations" were offered, but each was refuted by other evidence at the hearing. We proceed now to examine the asserted grounds of "sound administration, order, discipline and security."

(1) "Sound administration" -- The Bureau of Prison's food administrator initially testified that the problems in providing kosher food related to "the procuring of a separate amount of food, the administration of the procurement, receiving this special food, storage in separate facilities, the preparation of this food in separate utensils or containers, the serving of the food in separate serviceware, and the staff supervision to be sure that it was served properly and prepared properly" (A.170-1). On cross-examination he was asked whether use of prepackaged frozen meals did not eliminate these administrative problems. He replied only that such meals would not be acceptable "because of the limited variety" (A.207-8). The ease with

which such meals can be handled in the prison system was admitted by Warden Gengler who had first-hand, rather than theoretical, knowledge of what problems existed, (A. 377, 433) and were convincingly testified to by Mr. Cohen -- the inmate who had cooked and eaten the meals while in custody -- and by Mr. Goldstein -- who had packaged, sold and delivered the meals to the prison facility. All the witnesses with first-hand experience testified that there was no real administrative difficulty in using the frozen kosher "TV dinners." Indeed, except for a disciplinary problem that arose on one occasion -- and was not, we submit, attributable to the provision of kosher food -- Warden Gengler had to admit that his "experiment" with kosher food was a "success."

(2) "Order" and "discipline" -- This was the principle ground on which Judge Griesa relied in sustaining the Bureau of Prison's position, and it was the primary reason stated by Warden Gengler. The argument is, in substance, that if observant Jewish prisoners are given kosher food, "others would demand to be similarly

treated" and prison discipline would be affected. The case of prisoner Ron is cited as an illustration of what might occur. The "explanation" evaporates, however, on close examination.

First, the very existence of any prison regulations protecting the practice of religion is a recognition that not all prisoners are to be treated alike. The Bureau of Prisons Policy Statement authorizes special privileges by way of retention of sacramental objects, possession of religious literature, accessability of religious worship, availability of counseling, use and consumption of certain sacramental foods, observance of Sabbaths and religious holidays, etc. Indeed, even as to the right to wear a beard, prison rules have permitted beards to be worn by religious observers. (A. 462-68). In each of these instances, to use Warden Gengler's phrase, there would be a distinction between the "haves" and the "have-nots." Those who profess no religious belief or who have a faith that requires no particular forms of practice would not be getting the privileges that religious believers have.

Yet the Bureau has recognized that in prison, as in the outside world, inmates must recognize that our society is not homogeneous. And, if the testimony of one prison chaplain (called as a government witness) is to be believed, the special provision of Passover meals and certain sacramental foods, as well as rights to observe Sabbaths and religious holidays, has caused no resentment from other inmates. (A.466-68).

Second, the record refutes the general assertion that prison discipline is disrupted when kosher food is provided to observant Jewish prisoners. Warden Gengler testified that a five-and-one-half-month experiment relating to one prisoner was a "success" and only presented questions when, for a brief period, a different prisoner was the beneficiary of the food. He agreed that there was no other case he knew of -- other than that of Ron -- where discipline had been disrupted. Mr. Cohen testified unequivocally that there was no envy on the part of other inmates who saw him eating kosher TV dinners; they would ask, instead, "why I am

eating the TV dinners and the frozen food, when I could have the pick of the kitchen" (A.335). Defendant Smilow also testified that no other inmate envied his special diet, and the nutritionist who was called by the defense recounted the commonly held view that TV dinners are not considered preferable to fresh-cooked food. 7/

Third, even if it were true that providing special religiously prescribed food to one identifable group of of prisoners would produce resentment on the part of others, such opposition could not be relied upon by prison officials to deny the rights of the first group. In every real sense, the argument made in this regard by the Bureau of Prisons is analogous to the defense asserted in Cooper v. Aaron, 358 U.S. 1 (1958), where it was claimed that popular resentment to desegregation of public schools in Little Rock, Arkansas - even when accompanied by actual violence - justified the

7/ As for prisoner Ron, a fellow inmate testified briefly but convincingly that, "Nobody liked Rabbi Ron" (A.496) and that resentment against him was not "attributable to his receiving special privileges such as kosher food" (A. 498).

denial of the constitutional rights of black children. The assertion was resoundingly rejected by a unanimous Supreme Court, which said, in terms applicable here, that "law and order are not here to be preserved by depriving [petitioners] of their constitutional rights." 358 U.S. at 16. Constitutional rights are not subject to popular vote and government officials may not condition the availability of such rights on public support. And where the only claim that was made was not that there was overwhelming hostility but that "six militant Black Muslims" objected, the proper response would have been to discipline the six militants, not to deny constitutional rights to the religious observers.

(3) Security. - Here again, the Bureau of Prisons' food administrator asserted that there would be some security problem if special foods were brought in for observant Jewish prisoners (A. 182). But when Warden Gengler testified, he said that the security problem is no more severe than in any other instance when food is brought in from outside. When the "experiment" was tried during Stuart Cohen's imprisonment, the food packages were simply "shaken down" - the usual prison examination (A. 378).

A final ground relied on by Judge Griesa relates to the cost of the kosher frozen meals. To the extent that the higher cost of these meals affects the attitude of other prisoners - who might believe that greater expense is incurred for those receiving kosher meals - the same response we have previously outlined applies. And to the extent that the higher cost allegedly presents an economic problem for the Bureau of Prisons, the argument is refuted by the admittedly small number of federal prisoners who would be requesting such special foods.[8/] Indeed, as Judge Weinstein observed, prisons are obliged to make a variety of special arrangements for food and medical treatment of those they take into custody. The small added cost of providing for these special needs seem de minimis.

Moreover, the prisoners or their community organizations could underwrite the difference in cost. That proposal was made in the district court, but it was rejected by Judge Griesa on the ground "that it would be contrary to good order and discipline to premit one group of prisoners, or organizations supporting them, to pay for their more expensive, special

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8/ No problem was apparently created by the five-and-one-half-month "experiment" conducted in 1974, when the total cost was paid by the Bureau of Prisons.

food." The "order and discipline" argument has been previously discussed, and we submit that it is particularly unsound when it is used to reject an offer of assistance by a community group (given the Bureau of Prisons' explicit policy of encouraging contacts between prisoners and community groups (A.427-8)). In addition, it is hardly likely that a prisoner will view it as a special treat for his fellow inmate to receive TV dinners - which are not generally viewed as desirable - at considerable personal expense.

A final contention - that such a subvention from an outside source would violate federal regulations - seems totally without substance. The Bureau of Prisons accepted Passover food provided by the New York Board of Rabbis for a number of inmates at the Detention Center in New York without any apparent problem. During the hearing, when repeated reference was made to a regulatory restriction on such funding, the government was asked to produce the regulation that inhibited such a practice. No such regulation has yet been disclosed.

II

DEFENDANT HUSS IS ENTITLED TO
HAVE KOSHER FOOD IF HE WOULD
PREFER IT FOR "RELIGIOUS" REASONS

For the reasons we have stated above, we believe that the case of defendant Smilow is entirely clear. He is a strict observer of kashruth and is entitled to continue that observance, absent "compelling" reasons, while in federal custody.

Defendant Huss presents a slightly different case. He testified that he eats kosher food if it is available, and does so for "religious" reasons. Under these circumstances, we believe, for reasons similar to those discussed above, Huss is also entitled to have kosher food provided for him.

In its Policy Statement, The Bureau of Prisons has recognized that a prisoner is free "to change religious affiliations" while in prison. Para. 4(a) of Policy Statement 7300.43B, June 27, 1973 (Def't Ex. No. 10). This is an acknowledgment of the fact that religion is not a subject into which civil authority may make extended inquiries, and that it is, ultimately, a personal choice. Accordingly, under the doctrine of Presbyterian Church v. Hill Church, 393 U.S. 440 (1968), the statement by a prisoner that he would, for religious reasons, prefer kosher food should suffice to impose on the prison authorities the obligation to provide it.

Of course, if there is some evidence of lack of bona fides, that may be made the subject of inquiry. Short of such evidence, however, government officials should not enter into an extended investigation into a prisoner's religious beliefs.

Bona fides can hardly be in dispute in Huss' case. He testified very candidly from the outset -- even though he could readily have asserted dogmatic religious beliefs. If he were to formally "change" his religious affiliation in prison to Orthodox Jewish, he would be entitled, under the Policy Statement, to the same rights as Smilow. The lack of a formal change should not work to his detriment so long as his dietary choice is rooted in conscientious convictions.

III

THE DISTRICT COURT HAD JURISDICTION TO DECIDE WHETHER TO ATTACH A CONSTITUTIONALLY NECESSARY CONDITION TO A SENTENCE OF IMPRISONMENT THAT IT WAS IMPOSING

We turn finally to a jurisdictional issue that was raised by a panel of this Court on May 20, when a motion for interlocutory relief was argued here. Although the government did not assert any jurisdictional bar to our request for an order directing that the appellants be provided kosher food, this Court has raised, sua sponte, the question of the district court's jurisdiction. For reasons outlined below, we think it is clear that the court below had the authority to add to its judgment a provision regarding kosher food. Indeed, in our view, this was not merely a matter within the permissible range of the district court's power: it was essential for the court to add such a provision if its judgment of conviction was not to be constitutionally defective.

A. A sentence without a provision insuring that proper food is available to the defendant is an "illegal sentence."

The general commitment provision of the Federal Criminal Code directs district judges to commit offenders, "for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States . . . . " 18 U.S.C. § 4082. The general rule is, of course, that the district court's jurisdiction extends only to the duration of the imprisonment; it is the Attorney General's job to decide where and how the individual is to be kept in custody.

That general rule applies, however, only if, at the time the district court directs that the sentence be carried out, its form satisfies all appearances of legality. If, however, an Attorney General were to make it clear, in advance of a particular prisoner's incarceration, that he intended to impose cruel and unusual punishment on the prisoner -- by subjecting him to the rack and thumbscrew, by forcing him to sleep on a bed of nails, or by depriving him of food -- a district court could not, we submit, constitutionally direct that the defendant be handed over to the Attorney General. In that circumstance, the sentence would, quite simply, be an illegal one because of the necessary unconstitutionality of the punishment to be imposed.

This Court observed recently in Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973), that the Cruel and Unusual Punishment Clause "can fairly be deemed to be applicable to the manner in which an otherwise constitutional sentence . . . is carried out. . . or to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment. . . . " Cf. Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974). If a judge's unadorned sentence is such that the "conditions of confinement" imposed thereby will be "intolerable," he must add ameliorative conditions to bring it within the constitutional framework.

This Court and other courts of appeals have, in recent years, considered on direct review of criminal convictions the argument that the particular term of imprisonment imposed exceeded the bounds of the Cruel and Unusual Punishment Clause. Generally, such challenges are rejected -- although occasionally with suggestions

that district judges reconsider. See, e.g., United States v. Gervasi, 495 F.2d 762 (2d Cir. 1974); United States v. Kelley, 476 F.2d 211 (1st Cir. 1973), cert. denied, 414 U.S. 913 (1973); United States v. Frick, 490 F.2d 666 (5th Cir. 1973); United States v. Collier, 478 F.2d 868 (5th Cir. 1973); United States v. Black, 480 F.2d 504 (6th Cir. 1973). If courts of appeals may consider challenges to the duration of a sentence of imprisonment based on the Eighth Amendment, it is hard to see why other terms of that sentence may not be subjected to similar challenge.

Rule 35 provides that an "illegal sentence" may be corrected "at any time." That proviso is not limited, we submit, to a sentence that is illegal because it exceeds the maximum permitted by law; it covers a sentence that is "illegal" because the terms of confinement make it unlawful in toto. In this case, as this record amply demonstrates, the Bureau of Prisons has made a considered decision to deny proper food to Orthodox Jewish prisoners unless those prisoners give up their religious convictions. That decision makes it impossible for district judges who carry out their constitutional obligation to commit Orthodox Jewish offenders to the custody of the Attorney General. The only way they may impose "legal" sentences in these circumstances is by doing what Judge Griesa refused to do and what Judge Weinstein did do -- condition the Attorney General's custody of the offenders on the availability of kosher food.

B. The district court had general authority to direct that its sentence be carried out in a constitutional manner.

We have argued above that Judge Griesa had a constitutional duty

to add a provision to his sentencing order if it appeared, from evidence placed before him, that without such a provision the appellants would be depsrived of constitutional rights in prison. By the same token, this Court is obliged to vacate the sentence imposed by Judge Griesa if the execution of that sentence involves cruel and unusual punishment and other forms of constitutional deprivation.

Whether or not this Court agrees that such a course is mandated, we believe there was authority with Judge Griesa to add a provision to his order relating to the manner of executing the sentence. Judges regularly exercise authority to set surrender dates for the service of a sentence and to fix the place where surrender is to take place. Such incidental provisions are, to be sure, not as permanent as the relief requested here. But the same authority to handle incidental terms relating to imprisonment is a jurisdictional basis for the district court's exercise of authority.

C. The Application Should be Treated as a Motion Under 28 U.S.C. §2255.

In Kahane v. United States, No. 75-C-624, Judge Weinstein treated defendant's petition to vacate his sentence in that it unconstitutionally denied him his First Amendment privilege to kosher food, as a motion under 28 U.S.C. §2255, and instructed counsel to file an appropriate motion.

Judge Weinstein reasoned, based upon Hill v. United States, 368 U.S. 424, 426-27 (1962), that the statute permits a federal prisoner to move at any time to vacate or correct his sentence upon the ground "that the sentence was imposed in violation of the Constitution or laws of the United States. . . . "

Further, the sentencing court may, at any time, review the sentence imposed and correct the denial of a constitutional right violated by the imposition of the sentence itself. As noted by Judge Weinstein, "[t]he statutory right under section 2255 is not merely to a federal forum but to "full and fair consideration of constitutional claims." Kaufman v. United States, supra, 394 U.S. at 228, 89 S. Ct. at 1075, cf S. Fuld, Writ of Error Coram Nobis, 117 N.Y.L.J., Nos. 130-132, June 5, 6, 7, (1947); 28 U.S.C. §1651."

Additionally, as emphasized by the Supreme Court in Price v. Johnson, 334 U.S. 266, 284 (1948):

> . . . the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. . . . Justice may on occasion require the use of a variation or a modification of an established writ.

This case is certainly one where such elasticity should be applied; for it would be inequitable at this juncture to require that a new lawsuit be instituted in light of the ongoing and continuing nutritional harm and constitutional deprivation that appellants are suffering.

Particularly in light of the government's continued silence below as to any jurisdictional defects, this Court should not require appellants to file another lawsuit, in another jurisdiction - a process that will further compound their injury and delay their rightful relief.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of May, 1975, I caused to be mailed, Special Delivery Air Mail, postage prepaid, one copy of Appellants' Brief, to counsel for Appellees, Mr. Jerry Siegel, Esq., Assistant United States Attorney, U. S. Courthouse, Southern District of New York, New York, New York 10007.